No. 87-454

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# In the Supreme Court

OF THE

# United States

OCTOBER TERM, 1987

THE DOMINICAN REPUBLIC and
INSTITUTO de AUXILIOS y VIVIENDAS,
*Petitioners,*

VS.

CHARLES V. MEADOWS and GEORGE HARRIS,
*Respondents.*

## REPLY TO RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

SANFORD JAY ROSEN
COUNSEL OF RECORD
BARBARA Y. PHILLIPS
SUSAN S. FIERING
ROSEN & PHILLIPS
155 Montgomery Street
8th Floor
San Francisco, CA 94104
Telephone No. (415) 433-6830
*Attorneys for Petitioners*

310P

## TABLE OF CONTENTS


| | Page |
|---|---|
| TABLE OF CONTENTS ..... | i |
| TABLE OF AUTHORITIES ..... | ii |
| I. THE NINTH CIRCUIT RULING IS INCONSISTENT WITH THIS COURT'S REASONING IN ASAHI AND MAY DISRUPT THE INTENDED UNIFORM APPLICATION OF FSIA JURISDICTIONAL STANDARDS IN FEDERAL AND STATE COURTS ... | 6 |
| II. CONTRARY TO RESPONDENTS' UNINFORMED REPRESENTATIONS CONCERNING THE INTEREST OF THE DEPARTMENT OF STATE, THE DEPARTMENT WOULD CONSIDER SUPPORTING PETITIONERS' POSITION IN THE EVENT THE COURT GRANTS THE PETITION FOR WRIT OF CERTIORARI ..... | 17 |
| III. RESPONDENTS' ARGUMENTS AS TO THE TIMELINESS OF THE QUESTIONS PRESENTED FAIL TO COMPREHEND THE JURISDICTIONAL ISSUES INVOLVED, CONFUSE THE LOWER COURTS' DECISIONS AS TO JURIDICAL SEPARATENESS, AND MISAPPREHEND THE FACTS RELEVANT TO THE QUESTION OF JURIDICAL SEPARATENESS ..... | 20 |
| CONCLUSION ..... | 25 |

## TABLE OF AUTHORITIES


Pages

Cases

Asahi Metal Industry Co. Ltd. v. Superior Court of California, ___ U.S. ___, 94 L.Ed.2d 92 (1987) ..... passim

Ash v. Cort, 512 F.2d 909 (3rd Cir.), rev'd on other grounds, 422 U.S. 66 (1975) ..... 24

DeWagenknecht v. Stinnes, 250 F.2d 414 (D.C. Cir 1957) ..... 24

Feliciano v. Reliant Tooling Co., Ltd., 691 F.2d 653 (3rd Cir. 1982) ..... 23

First National City Bank v. Banco Para el Comericio Exterior de Cuba, 462 U.S. 611 (1983) ..... 23

Harris v. VAO Intourist, 481 F.Supp. 1056 (E.D. N.Y. 1979) ..... 15

Hercaire International, Inc. v. Argentina, 821 F.2d 559 (11th Cir. 1987) ..... 23

Pages

Cases (continued)

Meadows v. Dominican Republic, 628 F.Supp 599 (N.D. Cal. 1986), aff'd 817 F.2d 517 (9th Cir. 1987) ..... 16

Verlinden B.V. v. Central Bank of Nigeria, 461 U.S. 480 (1983) ..... passim

Statutes

Foreign Sovereign Immunities Act, 28 U.S.C.
§1602 ..... 4,5,6
§1605(a)(2) ..... 3,5 8,16

H.R. Rep. No. 1487, 94th Congress 2d Sess. 12 (176) reprinted in 1976 U.S. Code Cong. and Admin. News 6610 ..... 14

Cal. Code Civ. Pro.
§410.10 ..... 15

Rules

Federal Rules of Civil Procedure
Rule No. 27 ..... 24

4 Moore's Federal Practice, (2d ed. 1984)
¶27.21 ..... 24

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# PETITIONERS' REPLY TO RESPONDENTS' BRIEF IN OPPOSITION

In their Brief in Opposition the Respondents (plaintiffs and appellees below) make a scattergun attack on the Petition including statements that are both irrelevant and untrue, such as those

involving purported statements by the president of the Dominican Republic (Brief in Opposition at 25) or by Petitioners' United States counsel (Brief in Opposition at 61). Petitioners do not address each of Respondents' incorrect factual or legal points as most of them plainly are not relevant to the questions presented nor to the reasons why this Court should or should not grant the Petition. In this Reply Brief, Petitioners respond only to the most egregious misstatements or confusing points in the Brief in Opposition.

Rather than meet the substance of Petitioners' arguments, Respondents struggle mightily to obscure the questions presented to this Court, and attempt to portray those questions as fact intensive and highly case specific. Thus, Respondents simply dismiss this

Court's instructive reasoning concerning due process issues of jurisdiction in Asahi Metal Industry Co. Ltd. v. Superior Court of California, ___ U.S. ___, 94 L.Ed.2d 92 (1987), by describing the case as merely "a state jurisdiction dispute involving a broken motorcycle part...." (Brief in Opposition at 43.) (Emphasis in Original.)

The confusion evident in Respondents' arguments that fail to address the issues raised in the Petition, prompt restatement here of the questions presented. They are as follows:

1. In determining whether jurisdiction exists over a foreign sovereign under the Foreign Sovereign Immunities Act, 28 U.S.C. § 1605(a)(2), which permits

jurisdiction to be asserted only when the cause of action is based on acts that cause a direct effect in the United States, may a court consider the general diplomatic and commercial contacts of the sovereign with the United States that are wholly unrelated to the cause of action?

2. May a court, consistent with due process, interpret the Foreign Sovereign Immunities Act, 28 U.S.C. § 1602 et seq., to permit the exercise of jurisdiction over a foreign sovereign based on the contacts of the sovereign with the entire United States rather than the forum state?

3. May a court find subject matter jurisdiction under the "direct effect" clause of the Foreign Sovereign Immunities Act, 28 U.S.C. § 1605(a)(2), solely on the basis of a promise to pay a commission somewhere in the United States?

4. Upon a timely motion to set aside a default judgment, may a court refuse to consider whether a foreign sovereign is juridically separate from an independent governmental entity, when the question of juridical separateness determines the existence of jurisdiction over the sovereign under the Foreign Sovereign Immunities Act, 28 U.S. §§ 1602 et seq.?

5. May a Court ignore the fact of a defendant's foreign sovereignty and the strength of that sovereign's defense to the action in deciding whether to set aside a default judgment entered against a foreign sovereign and a juridically separate entity?

The issues underlying the questions presented by the Petition are both complicated and subtle. They are also very important, as they involve proper interpretation of the Foreign Sovereign Immunities Act, 28 U.S.C. § 1602 et seq., and therefore have great significance not only for United States jurisprudence but also for the conduct of our foreign affairs. Rather than an analysis of relevant facts and these significant issues, Respondents' Brief in Opposition

attempts to obfuscate these issues and the central jurisdictional facts of this case: (1) the Institute, which was never served, is juridically separate from the Dominican Republic; and (2) other than the citizenship of Respondents, very limited use of the mail and telephones, and an alleged promise to pay a commission somewhere in the United States, the alleged acts giving rise to Respondents' claims have no connection with the United States whatsoever, much less with the forum state and federal District.

## I.

## THE NINTH CIRCUIT'S RULING IS INCONSISTENT WITH THIS COURT'S REASONING IN ASAHI AND MAY DISRUPT THE INTENDED UNIFORM APPLICATION OF FSIA JURISDICTIONAL STANDARDS IN FEDERAL AND STATE COURTS

Respondents incorrectly assert that the plain language of the FSIA, 28 U.S.C.

§ 1605(a)(2), and this Court's decision in Verlinden B.V. v. Central Bank of Nigeria, 461 U.S. 480 (1983) demonstrate that "minimum contacts between the foreign sovereign and the U.S. as a whole are [all that is required] for purposes of jurisdiction [under the FSIA] and due process." Brief in Opposition at 38-39. (Emphasis in Original.) Verlinden held only "that the grant of jurisdiction [to federal courts] in the Foreign Sovereign Immunities Act is consistent with the Constitution...." 461 U.S. at 497. The question of whether subject matter and personal jurisdiction "exists under the Act itself []" was remanded for determination by Second Circuit. Id. at 498.

Respondents also incorrectly assert that this Court's most recent decision addressing due process limitations on a

court's jurisdictional competence, Asahi Metal Industry Co. Ltd v. Superior Court of California, ____U.S._____, 94 L.Ed.2d 92 (1987), is irrelevant to the issues in this case, as Asahi involved only the power of a California State court to exercise jurisdiction over an extraterritorial defendant pursuant to the California long arm statute. According to Respondents "the Asahi case is totally inopposite [sic] to the instant case [which] involves a federal international long arm statute seeking jurisdiction over a foreign sovereign and using U.S. Embassies abroad to serve a summons and a complaint." Brief in Opposition at 43 to 44 et seq.

The significance of Asahi is that it address and passes on the minimum contacts that must exist between a party and a forum for due process purposes

before courts in the United States can assert jurisdiction over an alien party. In Asahi this Court specifically raised and reserved judgment on an issue that engages a concern included in three of the questions raised in the instant Petition for Writ of Certiorari (Petition at i to ii; repeated, supra at 3-5), i.e., "whether Congress could consistent with the Due Process Clause of the Fifth Amendment, authorize federal court personal jurisdiction over alien defendants based on the aggregate of national contacts rather than on the contacts between the defendant and the State in which the federal court sits." 94 L.Ed.2d at 105 n.*

Questions 1 and 2 in the Petition directly raise this point and force the issues of (1) whether under the FSIA Congress has defined the basis for

federal court jurisdiction over alien defendants so broadly and if so, (2) whether Congress consistent with due process may confer such expansive jurisdiction on the federal district courts.

As this Court recognized in Verlinden, the FSIA "expressly provides that its standards control in 'in the courts of the United States and of the States,' § 1604, and thus clearly contemplates that such suits may be brought in either federal or state courts." 461 U.S. at 489. Further, "the Act guarantees foreign states the right to remove any civil action from a state to a federal court, 1441(d)" and also provides "that any claim permitted under the Act may be brought from the outset in federal courts § 1330(a)." 401 U.S. at 489. In Verlinden, this Court also

stressed that "[t]o accomplish its objectives [of uniformity in standards in determining when a foreign sovereign may be sued] the Act contains a comprehensive set of legal standards governing claims or immunities in every civil action against a foreign state or its political subdivisions, agencies or instrumentalities." 461 U.S. at 488.

These components of the FSIA and this Court's decision in Verlinden must be considered in context with the Court's decision in Asahi, where the Court applied the principle that the Due Process Clause of the Fourteenth Amendment prohibits state courts from asserting personal jurisdiction over alien defendants who do not have minimum contacts with the forum state.

How can the Asahi decision be squared with the Ninth Circuit's decision

that in exercising jurisdiction under the FSIA courts may consider the foreign sovereign's contacts with the entire United States? Given Asahi, it is unlikely that there is any constitutional support for interpreting the FSIA as expanding state court jurisdiction over foreign sovereign defendants by enabling state courts to consider such a defendant's contacts outside the forum state.

May United States district courts, then, exercise jurisdiction under the FSIA over foreign sovereigns that do not have minimum contacts with the forum state or forum United States judicial district for due process purposes, while state courts may not, given the legislative purpose of assuring that the FSIA's standards are to apply uniformly in both federal and state court? See

Verlinden, supra, 461 U.S. at 488 to 489. Did Congress intend that the Dominican Republic's contacts only with California would have been relevant to jurisdiction under the FSIA if the instant lawsuit had been brought in a Superior Court of State of California, but that any and all contacts with the United States are relevant because the suit was filed in (or removed to) the United States District Court for the Northern District of California?

Asahi's relevance to the instant case is even more apparent when one considers the facts that the FSIA was based on the District of Columbia long arm statute (see H.R. Rep. No. 1487, 94th Congress 2d. Sess. 12(176) reprinted in 1976 U.S. Code Cong. and Admin. News 6610, 6612 (hereinafter "H. Rep.")), a statute whose reach is not nearly as far

as the California long arm statute that was involved in Asahi. The District of Columbia's long arm statute rejects jurisdiction where the only contact in the forum is the injurious consequence of an out-of-state actor omission. Harris v. VAO Intourist, 481 F.Supp. 1056, 1064 (E.D.N.Y. 1979). By contrast, the California long arm statute confers jurisdiction "on any basis not inconsistent with the Constitution of the state or of the United States." Cal. Code Civ. Pro. § 410.10, quoted in Asahi, supra, 94 L.Ed.2d at 100.

As this Court has recognized of the FSIA, personal jurisdiction exists only "if one of the exceptions to sovereign immunity set forth in the Act applies...." Verlinden, supra, 461 U.S. at 485 n. 5. The only FSIA exception to sovereign immunity that may apply to this

case is the one that provides a foreign state is not immune from the jurisdiction of the courts of the United States in any case

> in which the action is based ... upon an act outside the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States.
>
> 28 U.S.C. § 1605(a)(2).

See Meadows, Pet. App. at 41, 42, 628 F.Supp. 599, 604 (N.D. Cal. 1986), aff'd Pet. App. at 21-22, 817 F.2d 517, 523 (9th Cir. 1987). Nothing in that provision suggests that for any purposes of personal jurisdiction (much less subject matter jurisdiction) the United States district court in which a suit is filed may consider any acts outside of the forum state to determine whether that court has jurisdiction over the foreign sovereign.

These questions of statutory interpretation and constitutional limitation that are raised by Questions 1 through 3 of the instant Petition should be decided by this Court. See also Petition at 15 to 25.

## II.

## CONTRARY TO RESPONDENTS' UNINFORMED REPRESENTATIONS CONCERNING THE INTEREST OF THE DEPARTMENT OF STATE, THE DEPARTMENT WOULD CONSIDER SUPPORTING PETITIONERS' POSITION IN THE EVENT THE COURT GRANTS THE PETITION FOR WRIT OF CERTIORARI

Reaching outside of the record, Respondents contend that the questions in this case do not involve serious consequences for United States foreign affairs and are otherwise unimportant "as the [United States] Department of State declined to file a statement of interest in this case although clearly [it is] aware of its details." Brief in

Opposition at 35. Accord id. at 55 and 63. There is nothing in the record on this subject. However, the undersigned counsel of record for Petitioners can make the following representation on that subject.

To the best of our knowledge, the persons at the United States Department of State who would be responsible for deciding whether to file a statement of interest in this case were unaware of this case until after the Ninth Circuit rendered its decision. Further, not until October 14, 1987 when a dialogue on the matter was initiated between the Ambassador of the Dominican Republic and appropriate persons in the United States Department of State's Office of Caribbean and Latin American Affairs, did the Petitioners make any request to the Department of State to file a statement

of interest. Thereafter Assistant Secretary of State Elliot Abrams referred the matter to the Legal Advisor of the Department of State.

I was recently informed by one of the attorney Assistants to the Legal Advisor that the Department of State declined to submit a statement of interest in this Court addressed to whether this Court should grant the Petition for Writ of Certiorari. It would, however, consider filing a Statement of Interest with this Court in support of Petitioners' position in the event the Court grants the Petition for Writ of Certiorari.

## III.

## RESPONDENTS' ARGUMENTS AS TO THE TIMELINESS OF THE QUESTIONS PRESENTED FAIL TO COMPREHEND THE JURISDICTIONAL ISSUES INVOLVED, CONFUSE THE LOWER COURTS' DECISIONS AS TO JURIDICAL SEPARATENESS, AND MISAPPREHEND THE FACTS RELEVANT TO THE QUESTION OF JURIDICAL SEPARATENESS

Respondents fail to comprehend that Questions 1 through 4 in the Petition concern issues of subject matter and personal jurisdiction under Article III of the Constitution, as well as the Due Process Clause of the Fifth Amendment and the provisions of the FSIA. Hence, contrary to the Respondents' arguments (Brief in Opposition at i, 26, 31, 35, 36; Cross Petition in No. 87-634), those issues may be raised at any time and must be addressed and decided by the courts, which are charged to raise and address them sua sponte, whenever they are raised. See Petition at i to iii, 10 to

33 (esp. 29 to 31), Brief in Opposition to Cross Petition in No. 87-634.

Question 5 in the Petition for Writ of Certiorari assumes arguendo that the juridical separateness issue does not involve a jurisdictional defense. (Petition at iii, 34 to 38.) It must be timely raised.

Even assuming arguendo that juridical separateness is non-jurisdictional, Question 5 was properly raised below and is sufficiently raised before this Court in Questions 4 and 5 (Petition at ii to iii, 25 to 38). The question of juridical separteness was raised by Petitioners in the district court and was rejected on the ground that the question is one of "substantive law" rather than jurisdiction and need not be addressed when raised in a motion to set aside a default. 628 F. Supp. at 608,

(Pet. App. 63-65). The Ninth Circuit affirmed, holding that the question of juridical separateness was a matter of "substantive law" and that Petitioners were precluded from raising the issue having failed to demonstrate excusable neglect. 817 F.2d at 524 (Pet. App. 26-28). Thus, the timeliness of Question 5 is an issue that was raised and determined in the courts below and is subsumed in the Question itself.

Even if the juridical separateness issue were decided by this Court to be non-jurisdictional, but see Petition at 25 to 33, the "facts" recited by the Respondents for their argument that this defense must be deemed waived because of prejudice to the Respondents, Brief in Opposition at 52 to 65, are largely irrelevant to the issue. The "juridical separateness" of the Institute turns on

the facts of its operations and Dominican law, not any facts within the Respondents' knowledge. See e.g., First National City Bank v. Banco Para el Comericio Exterior de Cuba, 462 U.S. 611, 629-630 (1983); Hercaire International, Inc. v. Argentina, 821 F.2d 559, 564 (11th Cir. 1987). To the extent relevant "facts" were within the knowledge of parties or witnesses who are no longer available, suitable orders can be entered by the trial court to protect Respondents against any unfair disadvantage. See Feliciano v. Reliant Tooling Co., Ltd., 691 F.2d 653, 657 (3rd Cir. 1982).

Further, while Respondents now argue that several key witnesses are now unavailable, including the late Mr. Meadows (Brief in Opposition at 58-61), prior statements and representations of fact by Respondent Meadows fail to

mention even one instance about which he is the only witness competent to testify on behalf of his interest, especially concerning juridical separateness. (CR 71). As for the other allegedly unavailable witnesses, only Pete Culbertson is conclusively unavailable and he appears to have played a relatively minor role in Respondents' allegations. Finally, plaintiffs were in the best position to avoid any prejudice by perpetuating Respondent Meadows' testimony. See Rule 27, Fed. R. Civ. P.; DeWagenknecht v. Stinnes, 250 F.2d 414, 416 (D.C. Cir. 1957); see also Ash v. Cort, 512 F.2d 909, 911 (3d Cir.), rev'd on other grounds, 422 U.S. 66 (1975); 4 Moore's Federal Practice (2d Ed. 1984) ¶ 27.21.

## CONCLUSION

For all of the foregoing reasons, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

SANFORD JAY ROSEN
(Counsel of Record)
Attorneys for Petitioners

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